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BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (erroneously also sued as SAN DIEGO STATE UNIVERSITY)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DEENA DEARDURFF SCHMIDT,

Plaintiff,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, SAN DIEGO STATE UNIVERSITY, DOES 1-15,

Defendants.

CASE NO.: 07-CV-2343-DMS-WMc

ANSWER OF BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendant Board of Trustees of the California State University (answering for itself and as the proper legal entity operating San Diego State University, erroneously sued herein as a separate entity) ("Defendant") answers the first amended complaint filed by Plaintiff Deena Deardurff Schmidt ("Plaintiff") as follows:

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Nature of Action

1. Defendant lacks sufficient information and belief to admit or deny the allegations in paragraph 1 and therefore denies each and every allegation.

Parties

2. Defendant admits the allegations in paragraph 2 of the Complaint, except as follows: Defendant denies, on information and belief, the allegation that "Between 1994 and August 2007, Schmidt was employed as the head coach of San Diego State University's women's swimming and diving teams" as phrased. Defendant believes that at times plaintiff's correct employment status was slightly different, and that at times another person, a male, was employed with the title of coach of the women's diving team.

3. Defendant admits the allegations in paragraph 3.

4. Defendant denies the allegations in paragraph 4 except as follows: Defendant alleges that although San Diego State University (hereinafter, "SDSU") is a campus of the California State University (hereinafter, sometimes "CSU") system, but it is not a proper party defendant, and is not a separate legal entity apart from the Board of Trustees of the California State University.

5. Defendant lacks sufficient information to admit or deny the allegations in paragraph 5 and on that ground deny each and every allegation therein.

6. Defendant lacks sufficient information to enable them to fully admit or deny the allegations in paragraph 6 and on that basis deny each and every allegation therein at this time.

Venue

7. Defendant denies the allegations in paragraph 7.

Factual Allegations

8. Defendant admits the allegations in paragraph 8.

9. Defendant admits that between 1994 and 2007, plaintiff variously served in the capacities of swimming, diving and water polo coach at SDSU as an employee of CSU. Defendant currently lacks sufficient information to admit or deny the remaining allegations in paragraph 9 and on that basis deny each and every remaining allegation therein at this time.

10. Defendant admits that between 1994 and 2007, plaintiff variously served as a CSU employee in the capacities of swimming, diving and water polo coach for SDSU. Defendant denies the remaining allegations of paragraph 10.

11. Defendant admits the allegations of paragraph 11.

12. Defendant admits that SDSU operated a swimming pool for the first few years of Schmidt's employment. Defendant further admits that the pool was not NCAA compliant for water polo so the water polo team trained and competed off campus. Other than as admitted herein, defendant lacks sufficient information to admit or deny the remaining allegations in paragraph 12 and on that basis deny each and every remaining allegation therein.

13. Defendant admits that the Terry Pool was closed in 1996 for a brief period of time to perform upgrades on the pool. Defendant currently lacks sufficient information to admit or deny the remaining allegations contained in paragraph 13, and on that basis deny each and every remaining allegation therein.

14. Defendant lacks sufficient information to admit or deny the allegations contained in paragraph 14 and on that basis deny each and every allegation therein.

15. Defendant admits that the Board of Trustees did not construct a new campus pool in or about 1997. Defendant lacks sufficient information to admit or deny the remaining allegations contained in paragraph 15 and on that basis deny each and every remaining allegation therein.

16. Defendant admits that Associated Students publicized two student referendums to fund the new swimming pool and that one failed in 1998. Defendant lacks sufficient information to admit or deny the remaining allegations contained in paragraph 16 and on that basis deny each and every allegation therein at this time.

17. Defendant admits that the Terry Pool was demolished in or about the year 2000. Defendant lacks sufficient information to admit or deny the remaining allegations contained in paragraph 17 and on that basis deny each and every remaining allegation therein.

18. Defendant admits that the womens' swimming team trained off campus after the Terry Pool closed in facilities such as the City Heights and Joan Kroc facilities. Defendant lacks

sufficient information to admit or deny the remaining allegations contained in paragraph 18 and on that basis deny each and every remaining allegation therein.

19. Defendant lacks sufficient information to admit or deny the allegations contained in paragraph 19 and on that basis deny each and every allegation therein.

20. Defendant lacks sufficient information to admit or deny the allegations contained in paragraph 20 and on that basis deny each and every allegation therein.

21. Defendant admits that Rick Bay's contract was not renewed in or about 2001, that Gene Bartow was hired as interim Athletic Director, and that Mike Bohn was hired as Athletic Director at SDSU in or about 2003. Defendant lacks sufficient information to admit or deny the remaining allegations contained in paragraph 21 and on that basis deny each and every allegation therein.

22. Defendant admits that Associated Students sponsored a referendum to raise student fees to build a pool facility on campus, which passed in 2004. Defendant lacks sufficient information to admit or deny the remaining allegations contained in paragraph 22 and on that basis deny each and every remaining allegation therein.

23. Defendant became aware at some point that plaintiff was ill, but lack sufficient information to admit or deny the remaining allegations contained in paragraph 23 and on that basis deny each and every allegation therein.

24. Defendant admits that Jeff Schemmel was hired by CSU as Athletic Director for SDSU in the summer of 2005. Defendant also admits that in or about the time he was hired or began work, Jeff Schemmel became aware that Schmidt had cancer. Defendant lacks sufficient information to admit or deny the remaining allegations contained in paragraph 24 and on that basis deny each and every remaining allegation therein.

25. Defendant lacks sufficient information to admit or deny the allegations contained in paragraph 25 and each of its subparts and on that basis deny each and every allegation therein.

26. Defendant admits that Schmidt's contract for the 2006-2007 academic year expired on May 31, 2007. Defendant also admits that Schmidt was notified that her contract would not be renewed on or about June 11, 2007. Defendant further admits that Jeff Schemmel gave Schmidt

an additional two month contract until July 31, 2007. Defendant lacks sufficient information to admit or deny the remaining allegations contained in paragraph 26 and on that basis deny each and every remaining allegation therein.

27. Defendant admits that a new campus pool opened on the campus of SDSU in March 2007. Defendant lacks sufficient information to admit or deny the remaining allegations contained in paragraph 27 and on that basis deny each and every allegation therein.

28. Defendant currently lacks sufficient information to either admit or deny the allegations contained in paragraph 28 and therefore deny each and every allegation therein.

29. Defendant lacks sufficient information to admit or deny the allegations contained in paragraph 29 and on that basis deny each and every allegation therein.

30. Defendant denies the allegations of paragraph 30 except as follows: Defendant admits that SDSU hired a male to coach the women's swimming team in or about August 2007. Defendant further admits that the three coaches who currently coach the swim and diving team are men.

31. Defendant admits that Plaintiff opted to take an early retirement from CSU and enjoy the benefits of that status. Defendant lacks sufficient information to admit or deny the remaining allegations contained in paragraph 31 and on that basis deny each and every remaining allegation therein.

32. Defendant lacks sufficient information to admit or deny the allegations contained in paragraph 32 and on that basis denies each and every allegation therein.

33. Defendant lacks sufficient information to admit or deny the allegations contained in paragraph 33 and on that basis denies each and every allegation therein.

First Claim for Relief

(Against Board of Trustees and SDSU for

Sex Discrimination – Retaliation under Title IX)

34. In response to paragraph 34, which merely refers to paragraphs 1 through 33, Defendant incorporates its responses to paragraphs 1 through 33 herein by reference.

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35. No answer is required to paragraph 35 in that it sets forth solely a legal conclusion.

36. Defendant denies the allegations in paragraph 36.

37. Defendant denies the allegations in paragraph 37.

Second Claim for Relief

(Against Board of Trustees and SDSU for

Sex Discrimination under Title IX)

38. In response to paragraph 38, which merely refers to paragraphs 1 through 33 and 35, Defendant incorporates its responses to paragraphs 1 through 33 and 35 herein by reference.

39. Defendant denies the allegations in paragraph 39.

40. Defendant denies the allegations in paragraph 40.

Third Claim for Relief

(Against Board of Trustees and SDSU for

Sex Discrimination – Retaliation under FEHA)

41. In response to paragraph 41, which merely refers to paragraphs 1 through 33, Defendant incorporates its responses to paragraphs 1 through 33 herein by reference.

42. Defendant denies the allegations in paragraph 42.

43. Defendant denies the allegations in paragraph 43.

Fourth Claim for Relief

(Against Board of Trustees, SDSU for

Sex Discrimination under FEHA)

44. In response to paragraph 44, which merely refers to paragraphs 1 through 33, Defendant incorporates its responses to paragraphs 1 through 33 herein by reference.

45. Defendant denies the allegations in paragraph 45.

46. Defendant denies the allegations in paragraph 46.

Fifth Claim for Relief

(Against Board of Trustees, SDSU for Medical Condition and

Disability Discrimination under FEHA)

47. In response to paragraph 47, which merely refers to paragraphs 1 through 33,

Defendant incorporates its responses to paragraphs 1 through 33 herein by reference.

48. Defendant denies the allegations in paragraph 48.

49. Defendant denies the allegations in paragraph 49.

AFFIRMATIVE DEFENSES

Defendant also asserts the following separate, additional and alternative affirmative defenses:

FIRST AFFIRMATIVE DEFENSE

(To All Claims for Relief)

The complaint, and each cause of action, fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

(To All Claims for Relief)

Plaintiff's causes of action are barred, in whole or in part, by the applicable statute of limitations, including but not limited to, California Code of Civil Procedure section(s) 337, 338, 339 and/or 340, and the limitations periods set forth under FEHA, California Government Code sections 12941 et seq., for filing charges and suit.

THIRD AFFIRMATIVE DEFENSE

(To All Claims for Relief)

Defendant reserves its right upon factual discovery to assert that plaintiff has failed, refused, or neglected to mitigate or avoid the damages complained of in her complaint, or has elected remedies precluding damages claims. By reason of the foregoing, plaintiff is barred, in whole or in part, from recovering monetary damages from this answering defendant.

FOURTH AFFIRMATIVE DEFENSE

(To All Claims for Relief)

By reason of plaintiff's conduct, she is barred under the doctrine of unclean hands from all forms of relief sought in her complaint.

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FIFTH AFFIRMATIVE DEFENSE

(To All Claims for Relief)

Plaintiff's claims are barred because the actions of this answering defendant were reasonable in that the employer exercised reasonable care to prevent and correct any behavior, and the plaintiff unreasonably failed to take advantage of preventive or corrective opportunities.

SIXTH AFFIRMATIVE DEFENSE

(To All Claims for Relief)

Each and every cause of action in the complaint is barred by the doctrine of waiver.

SEVENTH AFFIRMATIVE DEFENSE

(To All Claims for Relief)

Each and every cause of action in the complaint is barred by the doctrine of estoppel.

EIGHTH AFFIRMATIVE DEFENSE

(To All Claims for Relief)

Each and every cause of action in the complaint is barred by the doctrine of laches.

NINTH AFFIRMATIVE DEFENSE

(To All Claims for Relief)

Plaintiff's state claims are barred by various immunities of the Government Code, including, but not limited to, Government Code sections 815, 815.2, 815.3, 818.2, 818.8, 820.2, 820.8 and/or 822.2.

TENTH AFFIRMATIVE DEFENSE

(To All Claims for Relief)

Plaintiff's claims are barred and plaintiff is barred from seeking any damages from the purported physical or emotional injuries allegedly suffered as a result of her employment and discharge in that the sole and exclusive remedy in this respect is governed by the California Workers' Compensation Act. Cal. Lab. Code §§3600 et. seq.

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ELEVENTH AFFIRMATIVE DEFENSE

(To All Claims for Relief)

All damages allegedly incurred by plaintiff were proximately caused by, and are attributable to, the acts of plaintiff, and plaintiff's conduct bars any and all claims for relief or, at a minimum, any recovery by plaintiff must be diminished by the percentage and extent of the plaintiff's own fault in the matters encompassed in her complaint.

TWELFTH AFFIRMATIVE DEFENSE

(To All Claims for Relief)

Plaintiff's causes of action, and each of them, are barred in whole or in part on the grounds of consent.

THIRTEENTH AFFIRMATIVE DEFENSE

(To All State Claims for Relief)

Defendant has not yet been able to ascertain whether plaintiff appropriately exhausted all statutory claims procedures or other administrative or judicial remedies, and therefore reserve the right to assert these defenses once further discovery takes place.

FOURTEENTH AFFIRMATIVE DEFENSE

(To All Claims for Relief)

For purposes of any theory of proof in which Defendant would independently have the burden of proof, this answering Defendant alleges that the actions taken by Defendant were done in good faith, and for legitimate business reasons.

FIFTEENTH AFFIRMATIVE DEFENSE

(Reserved)

This answering defendant presently has insufficient knowledge or insufficient information upon which to form a belief as to whether it may have additional, yet unasserted, affirmative defenses. This answering defendant therefore reserves the right to assert additional affirmative defenses in the event discovery indicates it would be appropriate.

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WHEREFORE, this answering defendant prays that:

1. Plaintiff be denied relief by way of her complaint;

2. Plaintiff's complaint be dismissed;

3. Defendant be dismissed with costs of suit and attorneys' fees; and

4. For such and other relief as the court deems proper.

Dated: July 23, 2008

PAUL, PLEVIN, SULLIVAN &
CONNAUGHTON LLP

By: s/Richard A. Paul
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BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, SAN DIEGO STATE UNIVERSITY

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DEENA DEARDURFF SCHMIDT, Plaintiff, v. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, SAN DIEGO STATE UNIVERSITY, JEFF SCHEMMEL, DOES 10-15, Defendants.	CASE NO.: 07-CV-2343-DMS-WMc **CERTIFICATE OF SERVICE** Complaint filed: November 7, 2007 Notice of Removal filed: December 14, 2007 Trial Date: April 6, 2009

I, Page Stout, hereby declare that I am over the age of eighteen years and not a party to this action. I am employed, or am a resident of, the County of San Diego, California, and my business address is: Paul, Plevin, Sullivan & Connaughton LLP, 401 B Street, Tenth Floor, San Diego, California 92101.

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On July 24, 2008, I caused to be served the following document(s):

- **DEFENDANT'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT**

on the interested party (ies) in this action by placing ☑ a true copy ☐ the original thereof and addressed as follows:

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By **ELECTRONIC SERVICE VIA CM/ECF SYSTEM**) In accordance with the electronic filing procedures of this Court, service has been effected on the parties above, whose counsel of record is a registered participant of CM/ECF, via electronic service through the CM/ECF system

I declare that I am employed by the office of a member of the bar of this court at whose direction the service was made.

Executed July 24, 2008, at San Diego, California.

PAGE STOUT